SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1026

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

LEE SCOTT NUNN,
Respondent.

BRIEF IN OPPOSITION

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JURISDICTION, CONSTITUTIONAL PROVISIONS, AND OPINION BELOW

The respondent adopts the petitioner's statement on jurisdiction and constitutional provisions. The opinion of the Illinois Supreme Court is reported at 55 Ill.2d 344, 304 N.E.2d 81 (1973), and set forth in the petition appendix, pages A 1-14. The opinion of the Illinois Appellate Court is reported at 7 Ill.App.3d 601, 288 N.E.2d 88 (4th Dist., 1972), and set forth in the petition appendix pages A 15-24.

QUESTION PRESENTED

When the respondent's conduct clearly manifests a reasonable expectation of privacy in the searched premises and that expectation is conveyed to a third party and police officials prior to the search, can that same third party who owns the premises nevertheless effectuate a valid waiver of the respondent's Fourth Amendment rights by consenting to a warrantless search of the premises which were set aside exclusively by the consenting party for the respondent's use.

RESPONDENT'S COUNTER-STATEMENT OF THE CASE

The respondent, 19 years of age, and his mother, Mrs. Rose Ann Nunn, were the sole occupants of a home owned by Mrs. Nunn in Champaign, Illinois. The respondent occupied a bedroom and kitchenette which Mrs. Nunn had set aside exclusively for the respondent's occupancy. The only access to the bedroom and kitchenette was through the respondent's bedroom door.

While the respondent lived with his mother, it was customary for Mrs. Nunn to enter her son's bedroom approximately three times a week to gather his clothes for washing and change his bedding. E. *12, 13 She generally had unrestricted access to her son's room until the specific occasion herein discussed when he locked his room. Mrs. Nunn would receive approximately five to ten dollars a week from her son for the services which she rendered. E. 15

The respondent generally kept his room unlocked. E. 16 Approximately seven to ten days prior to the search the respondent locked his room and told his mother not to enter. E. 11, 19

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* "E." refers to the Excerpts of Record from the trial court hearing which has been filed with the Clerk of the United States Supreme Court.

He had the only key to his room. E. 12 The respondent informed his mother that he had "moved out" although his possessions still remained in the room. E. 12 He further informed his mother that the room was locked and that she was not to go in. E. 12, 19 Mrs. Nunn did not ever object to or question her son as to why he locked the room or restricted her entry. E. 12 She never made any demand on her son for a return of the key. She did not give any indication to him that she had any intention of entering his room in his absence.

During her son's absence Mrs. Nunn became concerned about a table in her house which had been broken while she was at work during the day. E. 17 She surmised that "there must have been something going on" which caused her to be concerned about her son's activity in her house. E. 18 Mrs. Nunn then called her ex-husband, the respondent's father, who had since remarried and had assumed another residence. E. 17, 18

After discussing the matter with the respondent's father, the father then contacted a friend who was on the Champaign police force to inquire about the procedure for the police to search the respondent's locked room. E. 18 The father later informed Mrs. Nunn that the police would need a written consent from her to execute the search. E. 18

Mrs. Nunn then proceeded to the police station where she signed a consent form requested by the police to search her son's locked room. E. 18 Mrs. Nunn described the events at the police station as follows:

> "I told them that Scott was not living there any longer and that he had locked his room and told me that I should not go in his room because he didn't have all his possessions out of there yet and so I, I did not have a key to get into his room so therefore I didn't go into his room."
>
> E. 12

After arriving at Mrs. Nunn's home, the police officers used their own key to gain entrance into the respondent's locked room. E. 13, 14 A search of the kitchenette revealed narcotic substances contained in a cosmetic case. E. 15

The respondent was indicted on the basis of those items seized in the kitchenette.

Respondent's pre-trial motion to suppress these items "for the reason that the respondent's Fourth Amendment rights to be free from the unlawful search and seizure were violated" was granted by the trial court. E. 6 This action was affirmed by the Appellate Court of Illinois, Fourth District, with one Justice dissenting. An appeal was taken to the Illinois Supreme Court. That Court affirmed with three Justices dissenting.

The Illinois Supreme Court's opinion, on the basis of **Katz v. United States,** 389 U.S. 347 (1967), held that the instant search was violative of defendant's Fourth Amendment freedoms.

ARGUMENT FOR DENYING THE WRIT

A

The State's Characterization of This Case as One Involving the Principles of "Betrayal of Personal Confidences" Discussed in Hoffa v. United States, 385 U.S. 293 (1966) Is Erroneous.

The search in question has been held unconstitutional by three Illinois courts. For the first time in their petition the State now advances an argument never heard below—that despite the "betrayed confidence" of the respondent's mother, the search was legal within the purview of **Hoffa v. United States,** 385 U.S. 293 (1966); **On Lee v. United States,** 343 U.S. 747 (1957); **Lopez v. United States,** 373 U.S. 427 (1963); **United States v. White,** 401 U.S. 745 (1971).

The respondent did not convey any "personal confidence" to his mother as that concept is discussed in **Hoffa.** To the contrary, the respondent explicitly manifested a reluctance to place any confidence in his mother when he locked his bedroom door, retained the only key, and refused his mother or anyone else entry. It was the security of the locked door that created the respondent's reasonable expectation of privacy as well as his mother's failure to question his act of locking the door. The respondent's reasonable expectation of privacy was not premised upon any "personal confidence" in his mother.

The case at bar is readily distinguishable from **Hoffa** where the informant was personally invited by the defendant into his hotel room at various times when incriminating statements were freely made by the defendant. Justice Stewart observed in **Hoffa** that:

> "[N]o interest legitimately protected by the Fourth Amendment is involved. It is obvious that the petitioner was not

relying on the security of his hotel suite when he made the incriminating statements . . ."

Hoffa v. United States, 385 U.S. 293 at 302.

Because the respondent relied upon the security of his locked room and not any "personal confidences" of his mother, the State's reliance upon **Hoffa** is misplaced.

On Lee, Lopez and **White** involve revelations to the Government by individuals who were privy to incriminating statements made to them in confidence by the defendants. Those cases recite the proposition that a defendant does not have any constitutionally protected expectation that a person with whom he is conversing will not reveal the conversation to the police. These principles have not been raised or argued below and are inapplicable to the controlling Fourth Amendment issues for the same reasons heretofore stated in the discussion of **Hoffa.**

B

The Illinois Courts Correctly Held That the Respondent's Reasonable Expectation of Privacy Was Protected by Katz v. United States, 389 U.S. 347 (1967).

The reasoning of the Illinois Supreme Court and the Appellate Court begins with the apparently conceded (Petition, p. 6) and obvious fact that an expectation of privacy was created by the respondent in locking his room, retaining the only key, and refusing admittance to his mother. Applying the expectation of privacy concept of **Katz v. United States,** 389 U.S. 347 (1967), the Illinois Supreme Court further held that the respondent's expectation of privacy was reasonable in light of all the surrounding circumstances.

Still, the question remained whether the police acted reasonably in relying upon a consent by the mother who informed

them that she had been forbidden to enter the room and that her son had locked the room and retained the only key.

The Illinois Supreme Court correctly applied the waiver test of **Schneckloth v. Bustamonte,** 412 U.S. 218, 248-9 (1973), to find that the defendant did not voluntarily waive his right to be free from an unreasonable search and seizure effected by the third party's consent.

The respondent contends that the general concept of reasonable expectation of privacy and unreasonable encroachment upon that reasonable expectation of privacy is the governing principle which was enunciated by this Court in **Katz v. United States,** 389 U.S. 347 (1967), and is the principle which has been correctly followed by the Illinois Supreme Court.

Based upon similar factual circumstances, other jurisdictions have applied the reasoning of the Illinois Supreme Court by finding third party waiver searches repugnant to the Fourth Amendment protections of the United States Constitution. See **People v. Flowers,** 179 N.W.2d 56 (Mich., 1970); **United States v. Greer,** 297 F.Supp. 1265 (N.D. Miss., 1969); **Reeves v. Warden, Maryland Penitentiary,** 346 F.2d 915 (4th C.C.A., 1965); **United States v. Poole**, 307 F.Supp. 1185 (E.D. La., 1969); **United States v. Kahan,** 350 F.Supp. 784 (S.D.N.Y., 1972); **State v. Blakely,** 230 So.2d 698 (Fla., 1970); **State v. Evans**, 372 P.2d 365 (Hawaii, 1962); **State v. Pina,** 383 P.2d 167 (Ariz., 1963).

The respondent acknowledges there are other jurisdictions which have reached judgments inconsistent with **Katz** and the Illinois courts in third party consent-waiver situations. However, none of these cases found that the defendant had a reasonable expectation of privacy in the searched premises. See **State v. Kinderman,** 136 N.W.2d 577 (Minn., 1965), cert. denied, 384 U.S. 909 (1966); **State v. Vidor,** 452 P.2d 961 (Wash., 1969); **Jones v. State,** 383 A.2d 184 (Md., 1971); **Mears v.**

State, 190 N.W.2d 184 (Wis., 1971); **Morris v. Commonwealth,** 208 S.W.2d 58 (Ky., 1948), as distinguished **Sorensen v. State,** 478 S.W.2d 532 (Tex., 1972).

This Court recently held that third party consent searches are valid against a defendant if the prosecution establishes that the third party possessed "common authority over or other sufficient relationship to the premises or effect sought to be inspected." **United States v. Matlock,** — U.S. —. See footnote 7.

Before the Champaign police used their own key to search the respondent's locked room, they had already been informed (at the police station) by Mrs. Nunn that the respondent had locked the door, retained the only key, and instructed her not to enter. These facts do not support a finding within the principles announced in **Matlock** that the police reasonably believed that Mrs. Nunn possessed "common authority" or a "sufficient relationship" to the locked room.

It is noteworthy that the Illinois cases cited in footnote 6 of **Matlock** had already been distinguished, if not reversed, by the Illinois Supreme Court in reaching its decision in **Nunn,** 55 Ill. 2d at —, 304 N.E. 2d at 84, petitioner's Appendix at A-6. (See reference to "the **"Shambley** line of cases" which includes **People v. Haskell,** 41 Ill. 2d 25, 28-29, 241 N.E. 2d 430, 432 [1968]: **People v. Walker,** 34 Ill. 2d 23, 27-28, 213 N.E. 2d 552, 555 [1966]).

Our Society recognizes privacy as a basic dignity that this Court must protect. Privacy is imperative whether in a high rise apartment building, college dormitory, or family residence. Third party consent-waiver searches that are executed by police officers with the explicit knowledge that the consenting party is acting against the defendant's expressed and reasonable expectation of privacy violate the most basic protections extended by the Fourth Amendment. The respondent asserts that the judgment of the Illinois Supreme Court represents a salutary recognition of fundamental rights of privacy that the American citi-

zen needs at a time when contemporary urban living continues to erode reasonable expectations of privacy.

The respondent suggests that the manifest available foregoing authority from **Katz** and other courts cited herein dictate that the decision of the Illinois Supreme Court is constitutionally correct and the petition of the People of the State of Illinois for *certiorari* be denied.

CONCLUSION

The respondent had a reasonable expectation of privacy that was properly afforded the protection of the Fourth Amendment as applied by the decision of the Illinois Supreme Court. There was no valid waiver of any Fourth Amendment rights by this respondent. All of the facts in the record justify the respondent's reasonable expectation of privacy that the searched premises would be free from governmental intrusion with or without his mother's consent. The facts clearly negate the existence of authority in the mother, express or implied, to make a valid waiver.

The principle of "betrayed confidences" as argued in the State's petition is not applicable in this case and in view of the fact that this principle was not presented or argued in any of the Illinois courts it should not be reviewed by this Court.

Wherefore, the defendant prays that this Court will deny the Writ of Certiorari.

Respectfully submitted

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